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Measures to eliminate international terrorism

Letter dated 3 December 2007 from the Permanent Representative of Germany to the United Nations addressed to the Secretary-General

I am pleased to inform you about the outcome of the high-level seminar entitled "Towards a Comprehensive Convention on International Terrorism", held in Berlin on 11 and 12 September 2007 at the German Institute for International and Security Affairs, with the support of the Federal Foreign Office.

The seminar is a contribution to the ongoing negotiations on the draft comprehensive convention on international terrorism. The United Nations Global Counter-Terrorism Strategy (General Assembly resolution 60/288) also emphasizes the resolve of States Members of the United Nations to "make every effort to reach an agreement on and conclude a comprehensive convention on international terrorism".

The seminar analysed the draft comprehensive convention on international terrorism from a broader academic, legal and political perspective. The seminar brought together high-level Government officials from negotiating parties for the convention and renowned scholars in the field of international law, who provided valuable input on various legal issues.

The summary of the seminar, as well as legal analysis provided at the seminar, are attached for your information (see annex).

I should like to request that the present letter and its annex be circulated as a document of the General Assembly under agenda item 108.

(*Signed*) Thomas **Matussek**
Ambassador

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Annex to the letter dated 3 December 2007 from the Permanent Representative of Germany to the United Nations addressed to the Secretary-General

SWP

German Institute for International and Security Affairs

Towards a Comprehensive Convention on International Terrorism
High-Level Seminar, Berlin, 11-12 September 2007

Summary Report*

Part I: Why do we need a comprehensive convention on international terrorism? - Political views

In principle, there was a broad consensus among the participants of the seminar that a comprehensive convention on international terrorism was urgently needed, not least because terrorism presented a direct threat to the values of the United Nations. In view of the existing conventions against specific acts of international terrorism the questions were posed as to how effective these conventions have been so far in aiding the prosecution of terrorists, and what would be the added value of a comprehensive convention.

In this context, a participant held that the comprehensive convention could not only help to fill gaps within the system of the different conventions but also serve as a more substantiated basis for enhanced international cooperation. Several scholars stressed the obligation of states to cooperate not only in the prosecution but already in the prevention of terrorist acts. One of the scholars noted the fact that the convention also provided minimum standards for the treatment of alleged offenders.

Besides these practical aspects the symbolic value of a comprehensive convention was discussed. While some participants were of the opinion that no further political symbol was needed, others stressed that the existence of a common definition of terrorism agreed to by the UN General Assembly would be a great achievement. A participant pointed out that terrorism affected ..southern" countries at least to the same extent as it affected ..northern" countries.

* Prepared by the German Institute for International and Security Affairs (SWP) on demand of the participants of the seminar. This summary report does not provide for a complete reproduction of the discussions held during the seminar. It is not meant to endorse or reject any of the positions and proposals herein reproduced. The numbering of draft Articles of the comprehensive convention cited in this summary report follows UN Doc. A/57/37.

During a brief discussion of the notion of "state-terrorism" one scholar mentioned the difference between crimes committed by organs of states and state sponsored terrorist acts.

Finally, it was recalled by several participants that the main divergences in the present negotiations were linked to the central question of what kind of activities should be exempted from the scope of application of the comprehensive convention. Some participants were of the opinion that a new convention deserved the attribute „comprehensive" only if it included individuals, groups and state actors and that the offences should be called terrorism regardless of the perpetrator. This touched upon the complex issue of delimiting the scope of application of the convention vis-a-vis international humanitarian law and other rules of international law.

Part II: Tackling the remaining legal issues

Session 1: The relationship between the comprehensive convention and international humanitarian law

At the beginning several scholars pointed out that the central problem consisted in the fact that, as a consequence of the broad definition of offences in draft Article 2 of the comprehensive convention, a situation may be covered by the convention as well as by international humanitarian law at the same time. One of the basic challenges with regard to delimiting of the scope of application of the convention was to exempt certain acts governed by international humanitarian law without importing the complexities of that law into the convention. However, one participant held that some overlap between the two regimes was inevitable because terrorism often originated in situations of armed conflict.

One of the participants recalled that not all states were bound by the Additional Protocols to the Geneva Conventions and cautioned against enforcing such rules through a comprehensive convention on international terrorism.

Several participants objected to adding more language to the draft. Otherwise the text would become even more confusing. One of the participants stressed that an ambiguous convention would pose serious risks.

Regarding the exemption of certain activities from the comprehensive convention, one of the scholars emphasized that as far as the activities of armed forces during an international armed conflict were concerned, their activities were indeed fully governed by international humanitarian law so that an exclusion of such activities from the convention would not result in a carte blanche for committing acts considered offences by draft Article 2 of the convention. While some of the participants expressed their

concern that an exemption of armed forces could lead to a situation of impunity, others stressed that such an exemption would simply mean that certain activities would not fall under this particular convention but would not be precluded from criminal prosecution under the rules of international humanitarian law, in particular in the case of war crimes.

With regard to non-international armed conflicts one of the scholars held that there were no clear criteria as to when situations of internal disturbances and tensions crossed the threshold of a non-international armed conflict. Thus, it was questionable at what stage after the outbreak of internal violence international humanitarian law would come into play and would supersede the application of the comprehensive convention. Another scholar added that below the threshold of armed conflict there was only national law and human rights law applicable.

Furthermore, it was noted that it remained unclear whether the term "armed forces during an armed conflict" would also include members of armed groups belonging to a non-state party during a non-international armed conflict. Several experts were of the opinion that the term "armed forces" could also include non-state actors. According to this view, it could not be argued that by using the term "armed forces" the exemption would be limited to state actors.

One of the scholars expressed the opinion that the proposed alternative term "parties to a conflict" would not be helpful with regard to a clear cut delineation since the notion itself was not sufficiently clear at least under the law of non-international armed conflict. By contrast, it was stressed by a number of participants, that the term "armed forces" was a rather well defined term under international humanitarian law.

One of the scholars put forward that a major problem consisted in the fact that the activities of actors who did not fall under the definition of armed forces were not as comprehensively regulated by international humanitarian law as the activities of armed forces. For example, it was not clear under which conditions an individual could commit a war crime.

It was also noted that the direct participation of civilians in hostilities was not unlawful per se but - at the same time - was not privileged either under international humanitarian law. In this regard some participants expressed their concern that the comprehensive convention could undermine the status quo existing under international humanitarian law and create new legal asymmetries between states and non-state actors.

One of the scholars proposed to delimit the scope of application of the comprehensive convention by applying the principle of lex specialis and to completely delete

paragraph 2 of draft Article 18 of the convention. The two regimes - the convention and international humanitarian law - would then, in principle, be applicable side by side. A double criminalization of certain activities falling under both regimes would not pose any serious problems. However, any conflict between the laws would then have to be solved by applying the lex specialis rule with international humanitarian law prevailing. In particular he proposed the following formula "Any act which is justified under the rules of international humanitarian law, shall not be covered by the scope of application of this convention." However, as other scholars noted, this apparently easy solution entailed serious problems with regard to the practical applicability of the convention since any prosecutor, prior to initiating a prosecution, would have to examine whether the activity in question was indeed justified under international humanitarian law.

Some participants questioned whether there was a need for exemptions at all. According to this view, certain activities should be unacceptable regardless of who committed these acts.

Session 2: The relationship between the comprehensive convention and other rules of international law

One of the scholars emphasized that the definition of "military forces of a State" in draft Article 1 paragraph 2 of the comprehensive convention referred to national law and thereby contained an element of self-characterization. According to this view, for example, secret agents who according to relevant national law formally belonged to the military would operate outside the convention. Furthermore, as another scholar pointed out, it was a widespread phenomenon that the military was called in against riots, rebellion or other situations below the threshold of armed conflict. Another scholar made the proposal to specify paragraph 3 of draft Article 18 in order to cover activities undertaken by the military forces of a state in the exercise of their official duties during peacetime.

The opinion was expressed that it was not sufficiently clear what was meant by the term "other rules of international law". In this context it was pointed out by one of the scholars that the activities of military and police forces were at all times governed by the international law of state responsibility. Therefore, any activities of such forces could be excluded from the comprehensive convention. Some participants expressed the concern that this could lead to the creation of a situation of impunity. In addition, according to one of the participants, the exemption of certain actors was problematic from an ethical perspective since different actors would be treated differently although they may have committed an equivalent act.

Some participants expressed the opinion that an inclusion of military forces in the scope of application of the comprehensive convention would undermine the willingness of states to participate in peacekeeping operations since soldiers would run the risk of becoming the target subject of an extradition request on the basis of the convention. For this reason it was argued in favor of completely excluding military forces from the convention.

It was repeatedly stated by several scholars that the breadth of draft Article 18 paragraph 3 reflected the breadth of draft Article 2 of the convention. The definition of the offence in draft Article 2, as one of the scholars argued, was almost a description of what armed forces were paid to do. However, it was questioned by another scholar whether armed forces really do act in order to "intimidate a population". As a possible compromise it was suggested to include an unambiguous statement in the preamble affirming that members of armed forces legally could be held responsible for crimes committed but that these are not the subject of the present convention.

Part III: Next steps

As one of the participants noted, the negotiations on the comprehensive convention proved more difficult than in the case of the existing anti-terrorism conventions because the comprehensive convention did not concentrate on specific terrorist activities but on certain results of terrorist activities. Some participants expressed their concern that this could open wide leeway for prosecution and make the application of the convention more unpredictable.

One of the scholars recalled that although there was a widespread consensus that terrorism was to be condemned it was still not agreed that no objective whatsoever could justify the activities defined as offences.

In addition, there seemed to be no consensus on the question whether the draft in its current form provided a space for impunity and non-prosecution.

One participant warned that it was not a function of the comprehensive convention to rewrite international humanitarian law. Thus, it was suggested to modify the preamble accordingly in order to clarify the intention of the convention.

From a more practical point of view it was pointed out by one of the scholars that the comprehensive convention would have to be applied by judges at all levels down to municipal courts and that there was a need for an unambiguous text. However, in view of the diverging standpoints some of the participants advocated a pragmatic approach stating that a perfect text should not be expected. Rather the focus should be directed towards what was achievable.

The following remarks were made by different scholars with regard to specific draft Articles of the comprehensive convention: Regarding draft Article 2 one of the scholars suggested to limit the definition of offences to acts endangering the life and physical integrity of civilians since civilians constituted most of the victims of terrorist attacks. On the other hand it was put forward by a participant that it would be unacceptable to restrict the scope of application of the convention to offences committed against civilians and non-combatants. Instead, the formula would also have to cover terrorist attacks against military forces.

Several participants stressed that the definition in draft Article 2 was the product of difficult negotiations and that there was great reluctance to re-open agreed language. Yet some participants expressed themselves in favor of opening even those sections since, according to this view, nothing was agreed until everything was agreed.

Regarding draft Article 3 one of the scholars observed that the phrase "as appropriate" should be avoided and should be further clarified.

Regarding draft Article 12 it was proposed by one of the scholars to slightly change the word order of the article as follows "[...] including, in particular, international human rights law and the Standard Minimum Rules for the Treatment of Prisoners."

Regarding draft Article 18 paragraph 2 one scholar noted that the activities of armed forces during an armed conflict were always governed by international humanitarian law. Therefore it was proposed to delete the passage "as those terms are understood under international humanitarian law, which are governed by that law".

Another scholar noted that Additional Protocol II to the Geneva Conventions in Article 4 (2) (d) prohibited acts of terrorism. Therefore, it was suggested to include in draft Article 18 paragraph 2 of the comprehensive convention a specific reference: "activities of the armed forces [...] are not governed by this convention, unless they fall under Article 4 (2) (d) of Additional Protocol II to the Geneva Conventions."

Regarding draft Article 18 paragraph 3 it was pointed out by one of the scholars that the term "inasmuch" could mean "because" as well as "to the extent that". It was suggested by several participants for reasons of clarification to replace "inasmuch" by "because". Moreover, it was suggested by one of the scholars to replace the phrase "The activities" by "Other activities" in order to clarify and indicate the connection with the paragraph 2 of the same Article.

Moreover, it was emphasized that draft Article 18 paragraph 3 was to be read in connection with paragraph 4 which should be interpreted with good faith. One participant held that the intention of the newly proposed addition to paragraph 4 of Article 18 (UN Doc. A/62/37) was to emphasize that no impunity was intended for acts

excluded from the comprehensive convention. Thus, the convention did not preclude prosecution of those acts under other laws.

With regard to the new paragraph 5 of Article 18 (UN Doc. A/62/37), it was noted that international humanitarian law was not prejudiced by the comprehensive convention. This paragraph, read together with Article 18 as a whole, should provide guidance for those who would be responsible for its interpretation and application.

Participants agreed that this kind of open exchange under Chatham House rules between key persons for the negotiations of the comprehensive convention and with the input of distinguished scholars was extremely fruitful and contributed to confidence-building between the negotiators. Some participants suggested that further meetings in this or similar formats might be useful in order to break the impasse in the negotiations in New York.

Towards a Comprehensive Convention on International Terrorism
High-Level Seminar, 11-12 September 2007, Berlin

Part II, Session 1
The relationship between the convention and international humanitarian law

*Christian Schaller**

I. Introduction

- International anti-terrorist law must be compatible with other rights, obligations and responsibilities established under international law. One of the most complex relationships in this regard is the interplay between anti-terrorist law and international humanitarian law (IHL) in situations of armed conflict. IHL is specifically designed - for humanitarian purposes - to regulate the conduct of the parties to an armed conflict. Therefore, as a matter of principle an act which is governed by IHL and which is not unlawful under that law must not be treated as an act of terrorism.

- This principle must also be regarded in delimiting the scope of application of a comprehensive convention on international terrorism. The basic challenge, however, is to operationalize this principle. The idea pursued by both draft texts - the coordinator's draft and the OIC draft - is to exempt a priori certain activities from the scope of application of the comprehensive convention which are already governed by IHL. In order to understand the legal and practical implications of this approach it is necessary first to clarify which activities are indeed governed by IHL *in a way that justifies such an exemption* from the comprehensive convention *without creating any legal uncertainties and loopholes* regarding criminal prosecution.

II. Which activities are governed by and are subject to criminal prosecution under IHL?

- I would like to briefly address this question with regard to three categories of actors:
  - o activities of armed forces during an international armed conflict;
  - o activities of armed forces during a non-international armed conflict; and
  - o activities of persons not belonging to the armed forces who directly participate in the hostilities during an international or non-international armed conflict.

1. Activities of armed forces during an international armed conflict

- The term "armed forces" is defined in Article 43 of Additional Protocol I with regard to international armed conflicts. It includes all organized arms groups and units which are under a command responsible to a conflict party for the conduct of its subordinates. As far as Protocol I is applicable also the armed forces of liberation movements within the meaning of Article 1 paragraph 4 of the Protocol are covered.

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- Exempting the activities of armed forces during an international armed conflict from the comprehensive convention certainly does not provide these forces with a carte blanche. Serious violations of the laws and customs of international armed conflict by armed forces are criminalized as war crimes under the Geneva Conventions and Additional Protocol I as well as under the Statute of the ICC and customary international law. These are international crimes which must be prosecuted by all states.

2. Activities of armed forces during a non-international armed conflict

- Serious violations of the law of non-international armed conflict by armed forces are just as well covered as war crimes under international criminal law. However, two other issues are a lot more contentious in this context:

- First, there are no clear-cut criteria as to when situations of internal disturbances and tensions cross the threshold of a non-international armed conflict. At what stage after the outbreak of internal violence does IHL come into play and would supersede the application of the comprehensive convention?

- The second issue is even more problematic: The term "armed forces" is used but not defined under the law of non-international armed conflict. Does it also include non-state organized armed groups? While Additional Protocol II distinguishes between the armed forces of a state, dissident armed forces and other organized armed groups, Common Article 3 of the Geneva Conventions does not contain any such differentiation.

- Since it is also not clear which conditions must be fulfilled by a non-state actor in order to be qualified as a *party* to a non-international armed conflict, it would not be helpful to use the term "parties" instead of the term "armed forces" in order to delimit the scope of application of the comprehensive convention.

3. Activities of persons not belonging to the armed forces

- The activities of persons not belonging to the armed forces during an armed conflict are not as comprehensively and clearly regulated by IHL. Under the law of international armed conflict only members of the armed forces have the right as combatants to participate directly in the hostilities. All other persons are to be considered as civilians. As such they do not enjoy any privileges with regard to taking part in the hostilities.

- In contrast, the law of non-international armed conflict does not grant any such privileges for anyone. Accordingly this body of law does not explicitly distinguish between members of armed forces/combatants and civilians but only between persons taking a direct part in the hostilities and persons who do not participate in the fighting.

- Civilians who take a direct part in hostilities for such time lose their general protection against the effects of the hostilities and may be prosecuted under national law already for the mere participation in combat. This is true with regard to international as well as with regard to non-international armed conflicts.

- What is not clearly settled is the following question: Under which conditions may a civilian commit a war crime? In other words: In which cases are states obliged on the basis of IHL and international criminal law to prosecute - as an international crime - an act of violence committed by a civilian during an armed conflict? One of the fundamental conditions is that the conduct took place in the context and was associated with the armed conflict. This link may be much more difficult to prove in the case of a civilian than it is in the case of a member of the armed forces. Moreover, the person must violate a norm of IHL by which he or she is individually bound. The norms of IHL in the first place address the conflict parties as collective entities. At the same time, every member of the armed forces of a conflict party is automatically bound by these norms. In the case of a civilian this issue deserves closer consideration. A good argument can be made that even civilians are bound to respect the principles of IHL derived from established custom, from the principles of humanity, and from dictates of public conscience. Nevertheless, this formula is still too vague with regard to criminal prosecution.

- I would like to illustrate the problem briefly by an example: Members of a non-state armed group who are militarily organized and operate under a responsible command may qualify as a party to a non-international armed conflict. If they deliberately target civilians there is no doubt that this act constitutes a war crime. But what about a person who belongs to a small cell which is not in any way militarily organized or commanded? And what about a single person targeting other civilians who is not affiliated to any entity? Do these acts also constitute war crimes just because they took place in the context of an armed conflict?

III. Conclusion

- Taking into account these uncertainties I suggest to draft the exemption in Article 18 paragraph 2 with utmost restraint and as narrow as possible. In particular the formula should avoid any terms which are not clearly settled under IHL. The comprehensive convention must not import the complexities and uncertainties inherent in IHL. And it must not promote a redefinition of certain IHL terms and rules.

- To be clear on this: An activity which is not exempted a priori from the comprehensive convention does not automatically constitute an offence within the meaning of draft Article 2 of the convention. This provision itself requires that the act is committed "unlawfully".

- The direct participation in the hostilities by a person who is not a member of the armed forces in an international armed conflict is not unlawful as such under IHL. It is just not privileged. Such person, therefore, would only commit an offence within the meaning of

the comprehensive convention if its action is to be considered unlawful under another specific legal prohibition, for example, if the conduct constitutes a war crime - which may be questionable in some cases as we have seen -, a crime against humanity, or an offence within the meaning of any other of the 13 international conventions against terrorism. On the other hand, however, it is not clear what is exactly meant by the term "unlawful". Does the unlawfulness of an act have to result from a prohibition under international law or could even a national prohibition render an act unlawful within the meaning of draft Article 2 of the comprehensive convention?

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The Relationship between the Comprehensive Anti-Terrorism Convention and International Humanitarian Law (IHL)

Christian Walter, Münster

Statement at the high-level seminar: Towards a Comprehensive Convention on International Terrorism, Berlin, 11-12 September 2007

I. Introduction

Although a substantial part of the Draft Comprehensive Convention is uncontroversial the negotiations have come to deadlock. The most controversial issue relates to what was in the former drafts Article 18 and has now become Article 20. This Article deals with the relationship between the Convention and International Humanitarian Law (sect. 2) and International Law in general (sect. 3). It is not always easy for an outsider, who has followed the negotiations closely from a scientific view, but has never been actively involved in the process, to understand the underlying controversies to their full extent. I apologize therefore right at the beginning for any incompleteness in my analysis of the interests involved and for possible shortcomings of my conclusions.

My general reading of the deadlock is that the negotiations have run into a trap which has been a major obstacle to international negotiations on combating terrorism from the 1960ies onwards. The issue behind Article 20 sect. 2 is the possible application of the convention to action taken by persons which some may qualify as "freedom fighters" and the issue behind Article 20 sect. 3 is the question of how to deal with state terrorism. This first panel is limited to the first question and I will limit myself to proposals concerning the relationship between the Convention and

International Humanitarian Law (IHL). Nevertheless, it seems important to me to stress that the two issues, although relating to distinct legal questions, are substantially linked with each other and it may be that a solution to the deadlock can only be found by tackling the issues jointly.

II. The Concept of Current Article 20 Sect. 2

The two different proposals existing at the moment do not differ as to their basic conceptual approach. Both, the proposal by the former co-ordinator and the proposal presented by the OIC countries exclude the application of the Convention when norms of IHL do apply. They differ in defining the scope of applicable norms of IHL. While the former co-ordinator refers to "armed forces during an armed conflict", the OIC wording is broader in referring to "parties" to an "armed conflict" and expressly addresses the situation of foreign occupation. The background for this difference is obvious and needs no further explanation, although it should be mentioned that some of the concerns of the OIC countries may be met by the application of Art. 1 (4) First Additional Protocol to the Geneva Conventions (AP1).

III. Lex specialis as an Alternative

Since we have been encouraged to suggest new approaches and solutions I want to take up a criticism of the general approach which I have already voiced elsewhere and try to develop a different overall approach to the relationship between the Convention and IHL.

In contrast to the current concept of two different legal regimes (either the rules of international humanitarian law apply or anti-terrorist law), I propose a solution on the basis of *lex specialis* on a case by case basis. To my mind such an approach, which is also already present in new proposals concerning the addition of a Article 20 section 5, has a number of advantages. The most important among them is a consistent definition of terrorist acts. It also is in line with the general practice of the General Assembly of the United Nations, which since 1994 has condemned "wherever and by whomever committed" without excluding situations of armed conflict.

Are there any reasons to avoid the application of anti-terrorist laws in armed conflict? An issue of major concern is that privileges granted by international humanitarian law should not be criminalized as terrorist acts. Furthermore there are fears that uncertainties relating to the laws of war (especially the laws of non-international armed conflict) may enter into anti-terrorist legislation. This could be viewed as incompatible with the general principle that criminal law should be clear and unambiguous. These two major criticisms will be addressed in the following, before the major advantages of relying only on *lex specialis* in order to de-termine the relationship between the convention and international humanitarian law will be summarized.

1. Double Criminalization

In many instances the acts qualified as terrorist acts under the convention will constitute "grave breaches" of international humanitarian law. As such they may and even must be qualified as criminal acts and be prosecuted. It is true that in this area an additional qualification as terrorist acts does not add much as far as actual legal consequences are concerned. But a double qualification as "grave breach" and as terrorist act does not present any legal problems either.

However, it allows qualifying the respective acts as "terrorist" irrespective of the concrete circumstances of their commission and thus provides for a consistent concept of terrorist acts.

The point may be illustrated by the different stages of internal conflicts. For common Art. 3 to the Geneva Conventions to be applicable the threshold of an "armed conflict" needs to be transgressed. The consequence of separating anti-terrorist law and international humanitarian law is that one and the same criminal act is qualified as terrorism as long as the threshold of "armed conflict" has not been reached, however, the qualification turns doubtful in the gray area around the threshold (i.e. when it is debatable whether or not it is possible to speak of an armed conflict) and it is finally definitively excluded once the threshold has been passed. Such a variable definition should only be used in the absence of better concepts. It is submitted that applying the *lex specialis* principle when individual rules collide is such a better concept.

Another, and perhaps the most important advantage of the lex specialis principle is, that it avoids any debate on privileges for "state terrorism" or freedom fighters. The acts are qualified as "terrorist" wherever and by whomever committed, even in cases of armed forces acting in an (internal or international) armed conflict.

2. Ensuring the Integrity of International Humanitarian Law

This is the area where the principle of *lex specialis* must apply. Acts which are justified by the rules of international humanitarian law should be excluded from the scope of application of the convention.

Examples:

1) An attack against a military computer system which may be a lawful target under the rules of international humanitarian law, could fall under an extensive definition of terrorism under Art. 2 of the Convention.

2) An attack against an ammunition factory, situated closely to a housing area, may be a law ful target under Art. 52 sec. 2 AP1 (effective military contribution of the object for the cam paign of Party B and a definite military advantage resulting from the attack for Party A). While the attack might have been carried out in a proportional way (Art. 51 sec. 5 lit. b AP1) and under all feasible precautions (c.f. Art. 57 sec. 2 lit. a) ii AP1) it may nevertheless cause great fear among the civilian population and thus could fall under Art. 2 no. 1 lit. b) of the draft convention.

3) Occupying forces carrying out a raid to find and arrest criminals in order to uphold the public safety (art. 43 Hague Convention IV of 1907) enter a muslim civilian housing area by night. Some male civilians, who want to protect the honesty of their wifes, who should not be looked at by western soldiers without their *hijabs,* are shooting at the occupying forces to make them withdraw. During this chaotic situation the occupying forces in self defence cause serious bodily harm to some of the armed muslim civilians. This action might have been nec essary and proportionate in order for the soldiers to protect themselves, but nevertheless could cause fear among the civilian population and thus might fall under Art. 2 no. 1 lit. b) of the draft convention.

2. Legal certainty

The proposal made here has already been criticized as endangering important functions of international humanitarian law in that it introduces new elements of criminalization which do not form part of the laws of war. This criticism certainly underlines the importance of qualifying the rules of international humanitarian law as *lex specialis* prevailing in case of conflict. However, it does not require a separation of régimes as provided for in the provisions mentioned. What is required, however, is a clear distinction of terrorist acts. It is submitted that certainty and clarity largely depend on the definition of terrorism as such. In addition to that, the scope of possible justifications under international humanitarian law also has an important influence.

► Example: Crimes according to Art. 8 Rome Statute depend on the element that the acts described in Art. 8 are not justified by provisions of IHL; the operation which has to be done is exactly the same. The only difference is that, in contrast to the Rome Statute, where a single judicial body decides, under the Draft Convention it would be the national Courts of the Member States. It is true, that this entails a certain danger of diverging decisions. However, this danger is imminent in the construction of the convention which does not provide for a centralised enforcement mechanism but relies on the Courts of the Member States. If one looks at Art. 2 of the Draft Convention and the many difficult elements used there (including the word "unlawfully" in the chapeau) it seems inevitable to conclude that in that area the Convention entrusts the national Courts with difficult tasks of interpretation anyhow. The real problem in that area, it seems to me, lies not with the exceptions discussed in Art. 20 of the Draft Convention, but rather with the extensively broad definition in Art. 2 of the Draft Convention.

3. Major Advantages

The qualification of certain acts as terrorism is not legally irrelevant, even when the laws of war apply. The anti-terrorist conventions contain clauses on mutual assistance and cooperation (Art. 12 Convention against Terrorist Bombings; Art. 13 Draft Comprehensive Convention) which would otherwise not be applicable.

The main advantage of applying the definition of terrorism also in times of war is that it adds to its consistency. The Draft Convention would apply to all acts of terrorism, wherever and by whomever committed and thus return to the formula of the General Assembly which has been used from 1994 onwards.

In sum: It is difficult to see, however, why the Convention against Terrorist Bombings and the Draft Comprehensive Convention schematically exclude a whole set of rules without regard to the question of whether they actually contradict each other in a given case. The solution favoured here is that each body of law follows its own logic to the largest extent possible: i.e. the terrorist conventions should apply where the criteria for the definition of terrorism are fulfilled, and the rules of international humanitarian law apply whenever there is a situation of an armed conflict. Acts which must be qualified as terrorism under anti-terrorism law are only excluded to the extent that international humanitarian law provides for a specific justification (as is the case for example with lawful targets ► see above). In all other cases there is no reason, why war crimes which match the criteria for terrorism should not be called and treated as such.

Proposed Draft Wording:

Any act which is justified under the rules of international humanitarian law, shall not be covered by the scope of application of this convention.

High-Level Seminar "Towards a Comprehensive Convention on International Terrorism",
Berlin, 11/12 Sept. 2007

The Relationship between the Convention and other Rules of International Law

Stefan Oeter*

1. Introduction

Terrorism poses a very serious threat to international peace and security. It operates in international networks and threatens any country in the world - nobody and no country, big or small, developed or undeveloped, can isolate itself from its effects. As UN-Secretary-General Kofi Annan expressed it: "Terrorism strikes at the very heart of everything the UN stands for. It represents a global threat to Democracy, the Rule of Law, Human Rights and stability." Most world leaders share this assessment.

We have heard in the first part of this seminar why we need a Comprehensive Convention as a supplementary instrument to the already existing network of specific treaties on combating the threat of terrorism. If we reflect on the relationship between such Convention and other rules of international law, a series of fundamental principles of general international law comes to our mind. The recent developments since 9/11 point our attention firstly to the principle of prohibition of the use of armed force in international relations. In addition, issues of the right of self-determination (and of its consequences in assessing the legality of certain uses of violent means against oppressive governments) are at the agenda. The principles of humanitarian law were already dealt with in the second section of the seminar. On a meta-level, however, also questions of state responsibility and international criminal law demand our attention.

The contribution will accordingly deal first with questions of the use of armed force, then with issues of self-determination. In a third and fourth section, questions of international criminal responsibility and of international criminal law will be raised. According to the format of the seminar, these remarks will only give some brief ideas and will formulate a set of theses; they will not deliver a comprehensive coverage of the issues involved.

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2. *The Prohibition of the Use of Armed Force*

Issues of terrorism and of counter-terrorist strategies have since a long time formed a hot issue under the general prohibition of armed force codified in Art.2 (4) of the UN-Charter. The traditional understanding did not qualify acts of terrorism committed by underground organizations against third state targets as acts of 'armed force' in the sense of Art.2 (4). Acts of transnational terrorism became only an issue under Art.2 (4) resp. Art.51 when they were attributable to a 'hintermann' state controlling the terrorist organization. The ICJ had to deal with the criteria of such control in its famous Nicaragua judgment - and chose a very restrictive construction. Attributability of such violent acts requires some kind of 'overall control' according to the ICJ. Supporting terrorist organizations logistically may constitute an internationally wrongful act in itself, but usually will not amount to an 'armed attack' in the sense of Art.51 if one follows the ICJ. There has been quite some debate around such a restrictive interpretation, but the ICJ has remained rather firm in this regard. In the aftermath of 9/11, an additional debate has arisen whether terrorist acts of such a heinous nature and intensity as the attacks on New York's World Trade Center might constitute an 'armed attack' in itself, entitling the target state to react directly against the relevant terrorist organization on the basis of Art.51. There is no clear answer to this question, and the draft Comprehennsive Convention does not contain an explicit reference to such debate. It nevertheless clarifies some delicate issues in this regard.

In doctrinal terms there were difficulties in determining the exact legal basis of the legal obligation to prevent terrorist activities from one's own territory, as well as the prohibition to support terrorist organizations in what form so ever. The draft Comprehensive Convention now explicitly codifies such obligations by formulating that states shall cooperate in the prevention of terrorist offences "by taking all practicable measures, including, if necessary and where appropriate, adapting their domestic legislation, to prevent and counter preparations in their respective territories for the commission" of those offences (Art.9 of the draft). Accepting the draft Comprehensive Convention thus would mean to agree that not only every form of direct or indirect support for terrorist activities would constitute an internationally wrongful act, but that states have to cooperate actively in suppressing every form of terrorist activities taking place within its territories. This is a valuable clarification on an issue hitherto disputed.

3. *The Principle of Self-Determination and Wars of National Liberation*

Such an all-inclusive obligation to cooperate, in combination with the broad and sweeping definition of terrorist offences in Art.2 and the jurisdictional regime linked to it under Art.7, might create difficulties concerning the right of self-determination. Although the struggle against colonial domination nearly has come to its end, the case of armed occupation remains as an open issue regarding self-determination. Since there exist open wounds of long-standing (illegal) occupation, and since experience demonstrates that new situations of armed occupation may occur from one day to another, states (in particular from the Third World) have been very cautious in this regard. This is all the more

explainable if one takes into consideration the continued support of a large number of states for the legal claim that aiding oppressed people in their 'wars of national liberation' does not constitute an illegal act of armed force, or a case of prohibited intervention, but is fully justified. If there were no safeguard clause included in the text of the treaty, the use of armed force by national liberation movements would fall under the definition of 'terrorist offences' according to Art.2 of the draft Convention, obliging states to cooperate in the prevention and criminal prosecution of such activities. The demand for a specific safeguard clause thus is understandable. This is all the more true if one takes into consideration the broad wording of draft Art. 18 paras.2 and 3, which exclude from the scope of application nearly any activity of armed forces during an armed conflict, but also in any kind of official duties outside such conflict. If one goes along this way, it is difficult to argue that national liberation movements should be fully covered by the scope of application of the draft Convention, whereas activities of regular armed forces of states would enjoy complete immunity from the provisions of the Comprehensive Convention. A preambular paragraph referring to the right of self-determination is not enough in itself to serve the purpose of exempting legitimate attacks of liberation fighters against military objectives from the notion of 'terrorist offences'.

By the way, the issue of 'wars of national liberation' is only part and parcel of a bigger problem created by the broad and sweeping definition of Art.2. Lawful attacks on military objectives exercised by liberation movements are covered by a range of rather clear legal rules. Even if these acts might qualify on first glance as 'terrorist offences' in the sense of the definition of Art.2, since they cause death, serious bodily injury or serious damage with the purpose to compel a government, they constitute lawful acts under international humanitarian law and are thus excluded from the scope of 'terrorist offences' under Art.2. This is not the case with acts of violence committed by insurgents in a non-international armed conflict. National governments (and legislators) usually will criminalize such acts as severe crimes against state security. International humanitarian law does not mirror such legal asymmetry, but all the attempts of the ICRC to extend the regime of international armed conflicts to internal conflicts (and thus to grant combatant immunity to fighters of insurgent military forces) have failed due to the unwillingness of states to 'legitimize' insurgents. Accordingly, international humanitarian law avoids to take any position on the legality of insurgency movements. In an overall perpsective of legitimacy, they may be legitimate or not - it is not the task of international law to undertake such a qualification. This leads to a problem under the draft Comprehensive Convention, however. In general, military activities of insurgent forces will fulfill the material requirements of the definition of Art.2. Contrary to acts of regular armed forces and national liberation movements, however, these acts will not be excluded with the definitional element "unlawfully" - they are unlawful under national law and not explicitly lawful under international law. But do we have sufficient normative consensus that any form of insurgency, under any condition whatsoever, is illegitimate and should be prosecuted worldwide? I have my doubts in this regard.

4. State Responsibility and Individual Liability under International Criminal Law

Admittedly, there exist clear differences between the operations of armed forces during armed conflict and the armed activities of liberation movements in self-determination struggles and insurgent forces in internal conflicts. Armed forces of states are put under a comprehensive legal regime, formed by the four Geneva Conventions and its two Additional Protocols. States are obliged to take care for the full implementation of the humanitarian law standards, including particularly the prohibition of indiscriminate attacks, and must sanction violations of the basic rules of humanitarian law. If they do not conform to these obligations, they commit an internationally wrongful act and become subject to the mechanisms of state responsibility. National liberation movements, to the contrary, are not formally bound to the Geneva Conventions, at least as long as they do not deposit the declaration under Art.1 (4) AP I. If they would profit from a wholesale exclusion like this is the case for the activities of armed forces, they could easily escape any responsibility. If they would take refuge to forms of terrorist violence - and experience shows that there exists a severe temptation to do this - an exclusion from the scope of application of the draft Convention could go along with a position where such liberation movements would act beyond any liability under international law.

A view to the principles of international criminal law corroborates this observation. Even if excluded from the scope of 'terrorist offences' as defined by the draft Comprehensive Convention, members of armed forces in international armed conflict are individually liable under the principles of international criminal law for war crimes and crimes against humanity. States are obliged under the Geneva Convention system to prosecute such international crimes, and it is generally accepted that they fall under the principle of universal jurisdiction which means that also other states, if the perpetrators are later found on their territory, may prosecute such criminal acts. In the case the state concerned does not fulfil adequately its obligation to prosecute, members of armed forces might even end up before the ICC, as soon as the home state and/or the state where the criminal acts were committed has ratified the Rome Statute. If not, the Security Council may still entrust the ICC with jurisdiction, as it did in the case of the Darfur crimes.

The issue is much more difficult in the case of liberation movements, and hopelessly deficient in the case of internal armed conflicts. As long as liberation movements have not submitted a declaration according to Art. 1 (4) AP I, their members are not covered by the 'grave breaches' provisions (with the resultant universal jurisdiction) of the Geneva Convention system. It is an open issue, whether and to which degree the other categories of war crimes as codified in Art.7 (2) (b), (c) and (e) Rome Statute cover terrorist acts of national liberation movements. It is even more doubtful whether terrorist acts outside armed conflicts will regularly fall under the category of 'crimes against humanity' as it is defined in Art. 7 Rome Statute, bearing in mind particularly the element of a large-scale and systematic attack against the civilian population. Accordingly, excluding activities of liberation movements completely, as was initially proposed by the OIC, would have opened a 'black hole' of impunity for terrorist acts committed by members of national liberation movements.

On the other hand, exempting armed forces of states competely from the scope of application of the Comprehensive Convention cements the 'impunity' more or less enjoyed by these forces in cases of internal conflicts and in the suppression of civil unrest and political riots. For non-international armed conflicts, the Geneva Convention system does not know any system of 'grave breaches' leading to an obligation of prosecution and to universal jurisdiction of all member states over such crimes. Jurisdiction remains more or less national - and the states concerned usually do not prosecute such crimes, at least if committed by their own armed forces. International humanitarian law with its own system of individual criminal liability does not constitute a 'contained regime' - just to the contrary, in the case of internal conflicts it is so deficient that it does not justify an argument of 'overlap of mechanisms'. Perhaps it would be too ambitious to expect a solution to this fundamental problem from the Comprehensive Convention - but the argument that the activities of armed forces are comprehensively regulated by international humanitarian law and that these rules should take priority as a kind of 'lex specialis' is simply not true for non-international armed conflicts (as it is not true with regard to human rights law in peacetime missions).

The recent compromise text tries to bridge the (in a normative perspective) unjustifiable discrepancy between the wholesale exemption for all activities of armed forces and the unconditional inclusion of acts of liberation fighters and insurgents (with the only exception of acts 'lawful' under IHL that are not to be qualified as 'terrorist offences' under draft Art.2). By referring in general to the "rules of international law applicable in armed conflicts, in particular those rules applicable to acts lawful under international humanitarian law", it exempts attacks against military objectives committed by members of liberation movements from the notion of 'terrorist offences'. It does so, however, only insofar as these acts are "lawful under international humanitarian law" - a condition which deliberately terrorist strategies will never fulfill. Accordingly, it incorporates the clear borderline drawn in IHL between 'lawful' acts of armed force exercised by liberation movements under humanitarian law, and 'illegal' terrorist acts falling under the scope of application of the draft Comprehensive Convention. It does not really solve, however, the issue of acts of violöence committed by insurgents in non-international armed conflicts.

It remains to be seen whether the proposed compromise formula will be sufficient to convince governments, but also the public in the South of the inherent fairness of the Convention's delimitation of what constitutes 'terrorism', and what legitimate acts of (military) violence against opposing forces. Alternative formulae of a convincing nature are not easy to find if one does not want to change the draft radically. The OIC proposal obviously goes too far in exempting also all other 'parties in armed conflict', thus creating the same grey zone of 'impunity' that was criticized here concerning armed forces also for liberation fighters and insurgents. A solution probably could be found best in the reshaping of the definitional formula of Art.2, by limiting the scope - as was proposed by Liechtenstein - only to acts committed against civilians, at least as far as situations of armed conflict are concerned. If the limitating clause were to be included in the safeguard provisions of draft Art. 18, it would either have to resemble the Jordan proposal from 2005, exempting activities during an armed conflict, except offences against protected

civilians, or it should be worded according to the model of Art. 12 Hostage Convention, which provides that the Convention does not apply insofar as the Geneva Conventions or its Additional Protocols are applicable and the Contracting States are obliged under these conventions to prosecute or extradite offenders of the terrorist acts.

5. *Concluding Remarks*

One could say also a lot concerning the uses of the principles of universal jurisdiction and of 'aut dedere aut judicare'. I see no criticsm, however, regarding the use of these principles in the draft Comprehensive Convention. The draft considerably extends criminal jurisdiction concerning terrorist offences, but still links this extension to traditional links of jurisdiction, avoiding whole-sale universal jurisdiction. Instead, it takes refuge to a general principle of 'aut dedere aut judicare', as known from the previous, more specialised anti-terrorist conventions. Since states are obliged to establish jurisdiction for all cases where they do not extradite authors of terrorist offences, a 'covert' form of universal jurisdiction enters the stage through the backdoor, however. Nevertheless, this type of 'universal' jurisdiction is much less aggressive, follows a much more reactive pattern - and this is easily compatible with traditional concepts of criminal jurisdiction.

To sum up: the core problem of the draft Comprehensive Convention is linked to the definitional formula of Art.2, which is by far too broad and sweeping, covering a whole range of cases that should not be discussed as an issue of 'terrorism'. By covering prima facie all kinds of military activities, it creates a bundle of problems, in linking the definition of 'terrorist offences' to the judgments of 'lawfulness' under IHL. Bringing back into the cage of an acceptable scope of application the legal ghosts set free by the over-broad definition of 'terrorist offences' seems to be a nearly insoluble dilemma. The exemtion clauses now contained in draft Art. 18 are too wide-ranging (in the case of armed forces) and too narrow (in the case of liberation movements and insurgents) at the same time. The attempt to bring under the coverage of the Convention not only acts of terror committed against civilians (a situation where there seems to exist an undisputed consensus in the international community), but also acts of violence committed against armed forces by non-state actors, extends the criminalization into an area where we do not have a sufficient normative consensus globally. This might perhaps work for acts of violence committed in peacetime. For acts of violence committed against military objectives in armed conflict, however, such a broad coverage would open up a pandora s box - the Comprehensive Convention would too easily conflict with the still evolving regime of non-international armed conflicts. A bit more caution (and self-restraint) in ambitions would enable negotiations to overcome the stalemate experienced in the last years. But this probably would require to go back to the definitional formula of Art.2 and to correct the mistakes made there in an earlier phase.

The Relationship between the Convention and Other Rules of International Law

Prof. Dr. Dres. h.c. J. A. Frowein

1. Introduction:

It is the privilege of the scholar to look at the Draft Convention in an independent manner, not influenced by the long history of negotiations known to those who have been involved. In that respect I would like to offer a few thoughts on what one could have wished if the political will would be present. But let me first say that there are certainly some very encouraging examples of progress in the Draft Convention which we have before us. I would stress in particular article 9 which lays down the obligation of States Parties to cooperate in the prevention of the offences and coordinate administrative and other measures.

Let me mention in that context that I argued almost twenty years ago when I dealt at The Hague Academy with the legal aspects of international terrorism that States are under an obligation to furnish information available to them to other States if that information is relevant to prevent terrorist acts affecting human lives in an indiscriminate manner. (Insgesamt J. A. Frowein, The Legal Aspects of International Terrorism, Center for Studies and Research in International Law and International Relations, The Hague Academy of International Law, 1988, 55-96).

2. The approach as to the sphere of application:

It is noticeable that the much discussed old Article 18 starts from the idea that there must be an exclusive sphere of applicability of the Convention on the one hand, and other rules of international law on the other. This approach is quite doubtful. It would mean that suicide bombings in the context of an internal armed conflict as we have it in so many parts of the world could not fall under the Convention. I see no legitimate reason for that. It seems much more consistent with the general rules of international law to apply both sets of rules together where there is no conflict between them. The rules of humanitarian law concerning non-internationalarmed conflict are much less precise as far as cooperation among States, extradition and prosecution are concerned, compared with the Draft Convention. Where a terrorist act is committed in an internal armed conflict, to take the most important example, both rules can be applied at the same time.

It should be underlined that a statement made almost twenty years ago is still valid: "It is not a far fetched conclusion from there to say that public international law can never contain a justification for terrorist acts where the laws of war do not apply, if, given their application, such a justification is excluded" (loc. cit. 78). Suicide bombings against civilians are

prohibited under humanitarian law and it makes no sense to exclude the application of the Convention from them.

We were informed at the meeting that according to an interpretation accepted in particular by northern states "armed forces" in Art. 18 par. 2 should be limited to armed forces of a State. Such an interpretation seems untenable in view of the fact that par. 3 speaks of "military forces of a State" and par. 2 does not have that addition. According to Art. 1 Protocol II this Protocol applies to armed forces of a party and dissident armed forces or other organized groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol. At least for those armed forces Art. 18 par. 2 would be seen as clearly applicable by anyone using normal rules of interpretation.

3. Human Rights Law

According to para. 3 of Article 18 the activities undertaken by the military forces of a State in the exercise of their official duties, in as much as they are governed by other rules of international law, are not governed by the Convention. Here again, a rule of exclusion is applied which is very difficult to justify. Human rights law applies to the activities by the military forces of a State in the exercise of their official duties. This leads to the inapplicability of the Convention. Does that make sense? It would be a privilege for military forces compared with other persons difficult to justify in the general context of the Convention. It would also not be in line with the idea that police forces are excluded from that rule.

It seems understandable that military forces of a State in the exercise of their official duties should be protected against charges which have no justification whatsoever. If one opts for the rule included in Art. 18 par. 3 one must be aware of the imbalance created between different forces of a non-international armed conflict.

4. The Reservation of Other Rules of International Law

Several provisions underline that the Convention should not be understood as affecting other rights, obligations and responsibilities of States, peoples and individuals under international law. This is laid down in Article 18, para. 2 as well as in the provision concerning territorial jurisdiction (Article 22). It is to be regretted that the Convention does not address an issue which is of great relevance in the context of international terrorism.

While the duty to cooperate is stressed in the Convention, the text does not go as far as it should. Let me refer to what was laid down as a general principle in 1988 in the Hague Seminar on Terrorism:

> "A State, on whose territory a terrorist act takes place, shall consider permitting the State whose nationals are taken hostage or are otherwise under imminent threat from terrorists to remove the threat if that is possible without creating any danger for the security of the territorial State" (loc. cit. 63).

This rule would seem to be a very important clarification of what the duty of cooperation must mean in specific cases. It is of course formulated on the basis of the famous Mogadishu incident when German police forces liberated the hostages in the Lufthansa plane. This was done after Somalia had given its permission. In cases where the territorial State has no possibilities to intervene it should at least be seen under the obligation to seriously consider whether or not forcible intervention by the threatened State, if this State has special forces available, should not be made possible.

Such a rule would also make it much less likely that unilateral intervention takes place. One must be aware that there is quite a trend in modern international law and practice to justify unilateral intervention in extreme cases. The Entebbe incident is a good example, but also the aborted interventions by the US or the action of Egypt on Cyprus.

A rule as indicated would clarify the obligation to cooperate in a particularly sensitive area.

In 1988 the issue of unilateral intervention was phrased as follows:

> "States shall not use force to protect their citizens who are under an imminent threat to their lives by terrorists on the territory of another State, unless that State fails to cooperate in order to remove the threat" (loc. cit. 69).

I remain convinced that this is a proper description of the law.

5. Some specific suggestions

5.1 The following words should be added to Art. 18 par. 2: "unless they fall under Art. 4, par. 2 d of Protocol II."

Since Art. 4 par. 2 d Protocol II protects all persons who do not take a direct part or who have ceased to take part in hostilities against acts of terrorism it would really be a contradiction to exclude the Terrorism Convention in that sphere. The added wording would clarify that where acts of terrorism take place against persons who do not take a direct part or who have ceased to take part in hostilities all the procedural rules of the Terrorism Convention would apply. They would add important obligations of States to prevent, to cooperate and to extradite concerning non-international armed conflicts where such obligations do not exist on the basis of either

common Art. 3 or Protocol II. It would not seem necessary to add similar wording concerning international armed conflicts where detailed rules exist in the IVth Convention and Protocol I.

5.2 Concerning Art. 18 par. 2 it should be added that this concerns activities by the military "or other security forces" of a State. It makes no sense to exclude special police forces which are frequently the ones used against terrorist acts.

5.3 Art. 4: The wording "as appropriate" in the last part seems very vague indeed. It would be much preferable to make Arts. 9 and 13 to 17 applicable in full for all terrorist offenses committed within a single State. There are some provisions which would be superfluous. However, there one could use the wording "shall, to the extent feasible, apply in those cases".

5.4 In Art. 13 it would be much more logical to put "in particular" before international human rights law and then continue with the standard minimum rules for the treatment of prisoners. Human rights law is hard law which is always applicable. The standard minimum rules are not hard law.

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NOTES ON INTERVENTIONS

(High level Seminar on the Draft Comprehensive International Convention on International Terrorism, 11-12 September 2007, SWP, Berlin)

Session I on Political Aspects

Coming as I do from India, I thought it would be a god idea to give a backgrounder to the discussion on the draft Comprehensive Convention on International Terrorism.

The 1994 General Assembly Declaration on Terrorism anticipated a comprehensive international convention on the subject. India's working Paper on 1998 resulted from this. The Indian initiative was motivated by a number of factors. One, since late 1980's thousands of innocent lives had been lost to terrorism. Over 30,000 lives were lost in India because of terrorism in Kashmir and the northeastern parts of India, well before 9/11. Two, India was disappointed with what was to be the Rome Convention on the Statute of the International Criminal Court, because unlike the 1994 ILC Draft of the Statute, it failed to include acts of international terrorism within the jurisdiction of the ICC. Three, India had by then evolved its own brand of bilateral counterterrorism extradition treaties beginning with the one with Canada in 1987, which had increasingly made it difficult for the terrorist to escape the law under the pretext of political offences doctrine. This feature of these treaties has been quite novel, and a representative example has been the Indo-British Extradition Treaty 1993 that excluded a specified list of criminal acts from the scope of the political offences doctrine. Four, the dozen or so international conventions on terrorism had dealt with the problem only piecemeal. There was a need to consolidate the elements of these conventions, and it was possible to do so by identifying common elements evolved over a long period of time in different contexts that have by now acquired consensus. The objective was to improve the level and scope of international cooperation in the administration of criminal justice in participant countries.

However, the 1998 Indian draft modified in 2001, has undergone considerable change through the vicissitudes of UN negotiations. One important omission from that draft is the annexed list of convention-based terrorist acts to be excluded from the political offences doctrine, while pursuing extradition under the draft convention.

As regards the relation between self-determination and terrorism, the fear of secession on the part of established states on the one hand and the zeal for national liberation movements to ensure minimal legal restraints on the other, is well balanced in the penultimate paragraph of the formulation of the principle of equal rights and self-determination in the Friendly Relations Declaration 1970 - a reference to which has been made in a preambular paragraph of the draft CCIT, and also in article 1(4) of the Geneva Protocol I of 1977.

Session II on Exclusion of IHL Situations

Chairman's observations: By way of a preliminary remark, Chairman Professor Mani said; At least three international anti-terrorism conventions - 1979 Convention against Taking of Hostages, 1997 Convention against Terrorist Bombing and 2005 Convention against Nuclear Terrorism -embody specific provisions to exclude terrorist acts covered by the International Humanitarian Law (IHL) from the ambit of these conventions. Therefore, it is appropriate for the draft CCIT to specify such exclusionary clauses. It is indeed interesting to note the changes that have occurred to Article 18 of the Indian Working Paper of 2001 - see Article 20 of the Consolidated Text of 2005 and Article 18 of the Telalian Draft of February 2007.

Prof. Mani made five substantive observations on the scope of terrorism-relevant IHL. *First,* the general postulates of IHL. Article 35 of the Geneva Protocol I of 1977 proclaims that the means and methods of warfare are not unlimited, but inhibited by three presiding principles: (1) the principle of discrimination of non-combatants from combatants and of civilian objects from military objects; (2) the principle of prohibition of means and methods causing unnecessary suffering and superfluous injury; and (3) the principle of prohibition of severe and lasting damage to the environment. These principles received emphasis at the hands of some of the judges in the *Nuclear Weapons* advisory opinion of the ICJ in 1966.

Second, The Court has also consistently upheld "basic considerations of humanity that are more important in peace than in war" - the *Corfu Channel* case 1949 and *Nicaragua Merits* case 1986.

Third, The Court in the *Nicaragua Merits* case further held that regardless of the character of an armed conflict (whether it is of international or non-international character), the minimum guarantees of treatment embodied in the common Article 3 of the Geneva Conventions 1949 shall apply to all situations of armed conflict.

Fourth, terrorism comprises a wide range of acts that are already prohibited under the penal laws of nations. These acts, regardless of whether they are terrorist acts or other criminal

acts, may in a given context qualify as war crimes, crimes against humanity or genocidal acts. Further, terrorism in armed conflict has a special purpose during armed conflict. Essentially, the detailed rules of IHL have a dual focus:

(1) *Protection of Civilians:* Article 33 of Geneva Convention IV of 1949 and articles 51 and 52 of the Geneva Protocol I of 1977 provide for such protection. Terrorist acts causing death, torture or inhuman treatment, taking of hostages or extensive damage to property are grave breaches of IHL qualifying for War Crimes (Art.147 of Geneva Convention IV and Article 8 of ICC Statute.). These acts may also in context amount to genocide or crimes against humanity.

(2) *Ban on terrorist acts against combatants:* The ban arises from the Geneva Protocol I Article 35 principles and the prohibition of acts of perfidy. Prohibition of extermination of the sick or the wounded (Article 12(2) of the Geneva Convention I, and Geneva Convention IV) renders such prohibited acts war crimes. Protection of PoWs under Geneva Convention III against torture or other physical violence would render the prohibited acts to qualify for war crimes or crimes against humanity.

Article 33 of the Geneva Conventions is the only provision that specifically employs the term "terrorism." It says: "All measures of intimidation or terrorism are prohibited."

Finally, IHL recognizes a national liberation movement as a party to an international armed conflict, provided (a) it is eligible under the Friendly Relations Declaration definition of self-determination and (b) it conducts itself strictly in accordance with the rules of IHL.(article 1 (4) & article 96(3) of the Geneva Protocol I of 1977).

Against this background of IHL, let us see what gaps there are in IHL in respect of terrorism.

Session III Exclusion of situations covered by other rules of international law

It is important to emphasise the need for respect for human rights in the context of counterterrorism measures. Ever since the General Assembly Declaration on Terrorism was adopted in 1994 there is a trend in state practice to compromise human rights in favour of counterterrorism. The refugee law has highlighted this - refugees find their rights curtailed now more than ever before, and state under the façade of counterterrorism can go around with impunity.

Session IV Steps ahead

I entirely agree with the points raised by Professor Tomuschat in his critique of Article 1 (c) and Article 18 of the draft CCIT. I wish to add two footnotes to what the learned professor said. One, diplomacy may be the art of the possible, but the in the interest of "consensus" so far achieved, the provisions already agreed to should not be reopened, seems to suggest that consensus is an end in itself. A treaty like CCIT requires to be implemented through

national laws and instrumentalities, and the decision-makers there would prefer precision to consensual ambiguity. Hence the importance of Prof. Tomuschat's contribution. Two, the problems pointed out by the professor arose mainly because the subsequent drafts tried to break some of the provisions contained in the original Indian draft into two or three separate provisions each, without caring much for the overall impact of the drafting changes. It is thus that Prof. Tomuschat finds the definition of terrorist acts contained in the current draft article 2(1) (c) to broad to include all "damage to property..." In the original Indian draft, all such damage still remained "serious damage."

One reason why I agree that there is a need for the CCIT is because it is settled by states, without leaving much to the vagaries of power politics at the UN Security Council. The Council will have to take note of the existence of CCIT whenever it deals with issues of terrorism.